

STATE OF NEW YORK
COUNTY OF MONROE

SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

FRANKLIN LEONARD,

Defendant.

Ind. No. 2000/0052

Appearances:

For the People:	Assistant District Attorney Tamara Christie
For the Defendant:	James Hinman, Esq. Attorney at Law

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

ANDREW YOUNG,

Defendant.

Ind. No. 2000/00210

Appearances:

For the People:	Special Prosecutor Joseph Shur
For the Defendant:	Donald Thompson, Esq. Attorney at Law

DECISION

MARK, JSC.

The assigned attorney (Hinman) for the indigent defendant in the first case (Leonard) submitted a voucher on March 13, 2001 requesting \$100 per hour for in-court and out-of-court time based upon extraordinary circumstances detailed in a convincing affidavit. This request was in excess of the \$40 per hour for in-court time and \$25 per hour for out-of-court time provided for in

Section 722(b) of the County Law. This court awarded the defendant's attorney \$75' per hour for in-court time and \$50 per hour for out-of-court time, relying upon the reasoning of prior nisi prius cases that it possessed such authority (People v. Young, 185 Misc2d 365; People v. Brisman, 173 Misc2d 573; People v. Wilson, 60 Misc2d 144; Department of Social Services ex rel Maitland v. Mitchell, 184 Misc2d 587).

The assigned attorney (Thompson) for the indigent defendant in the second case (Young) submitted a voucher on April 16, 2001 based upon extraordinary circumstances for an award in excess of the hourly rates permitted by statute but at rates to be determined by the court.

Between the receipt of the two vouchers an administrative order of the Chief Administrative Judge of the Courts was issued on March 18, 2001, which provided in Section 127.2(b), in relation to the application of an attorney for compensation in excess of the statutory limits, that "The application shall be filed with both the trial judge and the administrative judge, reviewed by the administrative judge, with or without' application, who may modify the award if it is found that the award reflects an abuse of discretion by the trial judge. Any order modifying .a trial judge's award shall ,be in writing." 2

Pursuant to that directive, the administrative judge on May 1, 2001, notified the

¹ The Chief Judge of the Court of Appeals has advocated that assigned attorneys in felony cases be compensated at the hourly rate of \$75 for both in-court and out-of-court time (NYLJ, 1/11/00, p. 1, c. 6), and the Family Court of Clinton County has awarded compensation at the rate of \$75 for both in-court and out-of-court time in 113 instances (NYLJ, 5/10/01, p. 1, c. 3).

² The surge in applications for indigent defense and law guardian applications in excess of the statutory limits was responsible for this directive (NYLJ, 3/20/01, p. 1. c. 5).

first attorney that this court "may not award a fee in excess of the statutory hourly fee" and that this court "has the authority to exceed the "cap" but only if the hours to be compensated at the statutory rate merit such sum." As a result of this development, the first attorney has not resubmitted an amended voucher and the Court delayed signing the second attorney's voucher. Each attorney challenges both the authority of the Chief Administrative Judge to promulgate Section 127.2(b) and the authority of the administrative judge to make the instant decision thereunder?

There is appellate precedent supporting the position of these attorneys that this administrative order is unenforceable

The Appellate Division, Fourth Department, found that 22 NYCRR 1022.12(b), which required that all vouchers seeking compensation in excess of the statutory limits required the approval of the supervising judge of the criminal courts in the appropriate judicial district, was in conflict with Section 722(b) and invalid Byrnes v. County of Monroe, 129 AD2d 229). In like manner, the Appellate Division, Third Department, held that 22 NYCRR 822.4, which authorized the county fiscal officer to apply to the presiding justice for a reduction in compensation in excess of the statutory limits, was -inconsistent with Section 722(b) and invalid (Kindlon v. County of Rensselaer, 158 AD2d 178). The Appellate Division, First Department, prior to those decisions, had discontinued review by the presiding justice of assigned counsels' applications for compensation and relinquished that responsibility to the trial judges (People v. Elliot,

3 The attorneys claim that the administrative judge erred by finding that this court lacked the power to enhance the hourly rates instead of finding an abuse of discretion.

98 Misc2d 424).⁴

However, while neither of the appellate decisions cited Matter of Werfel v. Agresta (36 NY2d 624),⁵ the holding of that case under circumstances similar to this case would seem to authorize the enactment of the administrative order in question. There, the assigned attorney, who believed the trial judge did not compensate him adequately for his representation, sought relief in a CPLR Article 78 proceeding. The Court of Appeals affirmed the Appellate Division, which had held that it lacked subject matter jurisdiction, and that Section 722(b) provided no basis for appellate review of orders granting or denying increases in the statutory fees.

Nevertheless, that Court's opinion continued, "This is not to say, however, that one situated like the petitioner is not entitled to adjustment of the allowance made to him by application through the several layers of judicial administration, that is, to the appropriate Administrative Judge and even to the Administrative Board of the court system."

⁴ A Letter to the Editor entitled "A Remedy for 18-B Lawyers" on the basis of these cases opined that the instant administrative order was untenable (NYLJ, 5/3/01. p/ 2, c. 6).

⁵ People v. Elliott (98 Misc2d 424, 426) apparently was cognizant of the possible impact of this case.

⁶ This is the recitation in Matter of Director of Assigned Counsel Plan of City of New York (87 NY2d 191), but this case actually held that there was no justiciable review of allowances made within the statutory maximums.

⁷ The Administrative Board is composed of the Chief Judge of the Court of Appeals and the Presiding Justices of each of the four judicial Departments (New York State Constitution, Article 6, Sec 28[a]; New York State Association of Criminal Defense

In the case of Matter of Director of Assigned Counsel Plan of City of New York (87 NY2d 191), where the Director of the Assigned Counsel Plan requested judicial review of an award in excess of the statutory limits to social workers, the Court of Appeals decided that such orders were now technically appealable, but that they still were essentially administrative in nature and not amenable to appellate review. Again, that Court reiterated, "To the extent that the trial court's unreviewable discretion produces truly anomalous consequences or patterns of abuse in particular situations, the problem can and should be addressed through the available administrative tools."

Thus, the Court of Appeals has sanctioned administrative review by an assigned attorney who claims that his compensation was inadequate and administrative review by a fiscal officer who claims that the assigned attorney's compensation exceeded the statutory limits,⁸ so the promulgation of Section 127.2(b) by the Chief Administrative Judge of the Courts is only the embodiment of these holdings and consequently valid.

The determination of the administrative judge is likewise within the authority reposed in him by this section.

Accordingly, since the administrative judge has disapproved the allowance to the assigned attorney in the first case in excess of the statutory hourly rate, this court is willing to award each attorney compensation at the statutory hourly rate but in excess of the statutory maximum of \$1,200 based upon extraordinary circumstance,

⁸ This obviates any claim of unequal protection of the law (see Williams v. Foubister, 176 Misc2d 702 -Rules of Chief Judge do not conflict with CPLR and do not deny equal protection of the law).

subject to the administrative judge's approval.

This decision constitutes the order of the Court.

Date: Rochester, New York

May 17, 2001

/s/ *Donald J. Mark*

HON. DONALD J. MARK
Justice Supreme Court